IP 03- 797-C H/S Fulmore v Home Depot
Judge David F. Hamilton Signed on 3/30/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CARL S. FULMORE, FRANCIS N. FULMORE, ALAN R. AKERS, PATRICE BAMIDELE-ACQUAYE, DAVID A. TAYLOR, MARIA A. BAVEN, All Plaintiffs, Plaintiffs, vs. HOME DEPOT, U.S.A., INC, Defendant.	)	NO. 1:03-cv-00797-DFH-VSS

UNITED STATES DISTRICT COURT
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CARL S. FULMORE, FRANCES N. FULMORE, ALAN R. AKERS, PATRICE BAMIDELE-ACQUAYE, DAVID A. TAYLOR, and MARIA A. BAVEN, Plaintiffs, v. HOME DEPOT, U.S.A., INC., Defendant.	)	CASE NO. 1:03-cv-0797-DFH-VSS

ENTRY ON MOTION FOR SUMMARY JUDGMENT ON ALAN AKERS' CLAIMS

Together with other plaintiffs, Alan R. Akers filed this action against his former employer, Home Depot, U.S.A., Inc., alleging that it discriminated against him based on his race and retaliated against him for reporting discrimination, both in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981. Akers claims that Home Depot refused to grant him a pay increase because of his race. He also claims that after he complained of race discrimination, Home Depot terminated him in retaliation for his complaint. Home Depot denies Akers' allegations, and has filed a motion for summary judgment on his disparate pay and retaliation claims. For the reasons below, Home Depot's motion for summary judgment is granted as to both claims.

Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment should be granted only where the pleadings, depositions, answers to interrogatories, affidavits, and other materials demonstrate that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Only genuine disputes over material facts can prevent a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it might affect the outcome of the suit under the governing law. *Id.*

When deciding a motion for summary judgment, the court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light reasonably most favorable to the non-moving party. See Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 255; *Baron v. City of Highland Park*, 195 F.3d 333, 338 (7th Cir. 1999). "[B]ecause summary judgment is not a paper trial, the district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). The court's only task is "to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Id.* The

facts set forth in this entry therefore do not necessarily reflection reality, but instead reflect the evidence before the court in light of the summary judgment standard.

Discussion

I. *Disparate Treatment*

Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Akers has alleged discrimination in violation of 42 U.S.C. § 1981, which prohibits racial discrimination in the creation and enforcement of contracts. The applicable legal standards on liability for race discrimination are the same under Title VII and § 1981. *Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 299 (7th Cir. 2004); *Williams v. Waste Management of Illinois*, 361 F.3d 1021, 1028 (7th Cir. 2004). Akers claims that Home Depot discriminated against him by promoting him to the position of delivery coordinator but failing pay him the same hourly wage it paid other delivery coordinators.[1]

[1]Akers has abandoned his claim that he was denied a promotion because of his race in violation of Title VII and § 1981. See Akers Response Br. at 20-21.

Home Depot hired Akers as a phone center associate at a pay rate of $9.50 per hour in January 2002 at its newly built store on Post Road in Indianapolis. Akers Dep. at 61, 86; Russell Aff. ¶ 5. After Akers agreed to expand his duties at the store and to pursue a fork lift certification, he was assigned a new job in May 2002. Akers claims that his new job was the position of "delivery coordinator."

Home Depot claims that Akers was never made delivery coordinator but was instead an "order puller." Akers could not have been the delivery coordinator, Home Depot argues, because the position no longer existed at the time Akers' job changed in May 2002. Joseph Lintzenich, Akers' supervisor, testified that Home Depot initially planned to make the new store on Post Road a "pro live" store, meaning that the store would employ "pullers" to pull customer orders and a delivery coordinator to oversee the paperwork for such orders. The store hired David Bailey, an African American male, as its first delivery coordinator. According to Lintzenich, Home Depot later decided that the store on Post Road would not be a "pro live" store, and when Bailey was terminated for poor attendance, Home Depot chose not to replace him, delegating the duties of "pulling orders" and coordinating deliveries to phone center and "pro desk" associates. Lintzenich Dep. at 25-29; Russell Aff. ¶ 6.

Akers disputes that Home Depot eliminated the delivery coordinator position. Akers testified that Lintzenich and store manager Jamie Meadows called him into a meeting in May 2002 in which they promoted him and raised his pay

by one dollar per hour. He testified that as he walked out of the meeting with Meadows, Meadows informed him that he was officially the new delivery coordinator. Akers Dep. at 86-88, 92-93; Akers Aff. ¶¶ 9, 10. Akers signed an Associate Action notice dated May 20, 2002. The notice stated that Akers was changing from a "phone associate" position to a "delivery puller" position and that he would receive a pay raise of one dollar per hour. Akers Dep. Ex. 20. Akers testified that he was told he was the new delivery coordinator on May 22, 2002. Akers Aff. ¶¶ 9, 10.

Akers testified that after this promotion in May 2002, he replaced Bailey and performed the same work that Bailey had performed. *Id.* ¶ 13. He testified in his deposition that his job included pulling and banding orders, signing off on delivery slips, running the phone center, returning customer calls, coordinating deliveries with the courier, fielding customer complaints, and checking and recording invoices. Akers Dep. at 96. He testified that approximately a month after his meeting with Meadows and Lintzenich, he complained to them that he was not being paid as much as Home Depot paid other delivery coordinators. Akers Aff. ¶ 11. He testified that he was never informed that he was not a delivery coordinator. *Id.* ¶ 17.[2]

[2]Akers claims that Bailey and other Home Depot delivery coordinators were paid "about $13.00 per hour" while he was paid an hourly rate of only $10.50. Akers Aff. ¶¶ 9, 12, 14. Akers also testified that Home Depot paid Caucasian employees who he claims replaced him, "Stacy Yance and another Stacy," more than it paid him. Akers Aff. ¶ 19. However, Akers fails to show that this information about other employees' pay was within his personal knowledge, as (continued...)

On December 20, 2002, Akers filed a charge against Home Depot with the EEOC claiming that he had been denied a promotion at the store because of his race. In his statement, Akers claimed that his "most recent position" had been as an "Order Puller" under Lintzenich. Akers Dep. 139, Ex. 28. In February 2003, Akers submitted an amended statement to the EEOC stating that Lintzenich and Meadows had promoted him during spring 2002 to the position of delivery coordinator but had failed to pay him the same wage paid to other delivery coordinators. Akers Dep. at 167, Ex. 32.[3]

A plaintiff may prove his claim for disparate treatment using either the direct or indirect methods of proof. Akers has offered no direct proof of racial discrimination. He relies on the indirect method adapted from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). For Akers to survive summary judgment on his claim of disparate treatment under the indirect method, he must come forward

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[2](...continued)
required under Fed. R. Civ. P. 56(e). See also *Payne v. Pauley*, 337 F.3d 767, 772 (7th Cir. 2003) (affidavits fail to defeat summary judgment when they are not based on personal knowledge). Accordingly, the court will disregard the assertions included in paragraphs 12, 14, and 19 of Akers' affidavit.

[3]Home Depot argues that Akers' assertions in paragraphs 9 and 10 of his affidavit that he was promoted to the position of delivery coordinator should be disregarded because they contradict the Associate Action Notice that he signed in May 2002, which stated that Akers was a "delivery puller" and his initial EEOC complaint, which stated that he was an "order puller." A party may not undermine Rule 56 by creating "sham" issues of fact with later-submitted affidavits contradicting prior deposition testimony. *Ineichen v. Ameritech*, 410 F.3d 956, 963 (7th Cir. 2005). Home Depot, however, points to no authority that requires or allows the court to strike portions of an affidavit because it contradicts prior representations in an EEOC statement or any other signed document. Also, it is not uncommon for parties, including both the employers and employees, to correct erroneous details in earlier statements.

with evidence sufficient to allow a reasonable jury to find that: (1) he is a member of a protected class; (2) he performed his job in accordance with Home Depot's reasonable expectations; (3) he suffered a materially adverse employment action; and (4) the defendant treated similarly situated employees outside of plaintiff's class more favorably. *Bio v. Federal Express Corp.*, 424 F.3d 593, 596 (7th Cir. 2005); *Beamon v. Marshall & Ilsley Trust Co.*, 411 F.3d 854, 861 (7th Cir. 2005). Akers has not demonstrated either that he was subjected to a materially adverse employment action or that he was treated less favorably than a similarly situated individual outside the protected class.

A. *Materially Adverse Employment Action*

Akers claims that he was promoted to a position as a delivery coordinator but paid an hourly wage less than what Home Depot normally paid its delivery coordinators. The plain language of Title VII demonstrates that compensating an individual less than other employees because of the individual's race would amount to a materially adverse employment action. See 42 U.S.C. § 2000e-2(a). Even assuming, however, that Akers has brought forth enough evidence to convince a reasonable jury that he was promoted to the delivery coordinator position, he has failed to show with any admissible evidence that he was paid less than any other delivery coordinator at Home Depot.

The court has disregarded Akers' statements in his affidavit regarding the amount that Home Depot paid Bailey and other delivery coordinators because

such statements lacked the factual foundation and personal knowledge required by Rule 56. Akers has provided no other evidence of a disparity in pay. With no admissible evidence of the pay of other delivery coordinators, Akers cannot raise a genuine issue of material fact as to whether he was paid less than others to perform the same job.

B. *Similarly Situated Individuals Outside Plaintiff's Protected Class*

Akers' has also failed to establish a genuine issue of fact as to the fourth element of the prima facie case. Akers must raise a genuine issue of fact as to whether he was treated less favorably than a similarly situated employee outside his protected class. *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir. 2003). Because Akers has failed, as was previously discussed, to demonstrate that he was treated less favorably than *any* other employee at Home Depot, the court's analysis of the fourth element could end here.

Even if this were not the case, however, Akers cannot satisfy the fourth element because he has also not offered evidence of any employee who was situated similarly to him. In the context of a disparate compensation claim, the Seventh Circuit has held that in order to be similarly situated to comparators, the plaintiff must show that his "performance, qualifications, and conduct, were comparable to the non-protected class member 'in all material respects.'" *Dandy v. United Parcel Service, Inc.*, 388 F.3d 263, 274 (7th Cir. 2004), citing *Durkin v. City of Chicago*, 341 F.3d 606, 313 (2003) (sex discrimination claim).

Even if the court were to consider Akers' assertions that Home Depot paid Bailey and other delivery coordinators approximately $13.00 per hour, such claims do not raise an issue of fact as to whether any other delivery coordinator was "directly comparable" to Akers "in all relevant respects." *DaimlerChrysler Corp.*, 388 F.3d at 300. Akers' conclusory claim that delivery coordinators at other Home Depot stores earned "about $13.00 per hour" fails even to name any such delivery coordinators, much less shows how they compared to Akers with respect to any relevant characteristic.

Akers also fails to raise an issue of fact as to whether the person he claims was his predecessor, Bailey (who was also African American), or the people he claims were his replacements, Stacey Yance and "another Stacy," were situated similarly to him. Akers' argument regarding Bailey does not draw any comparison between himself and any employee outside of his protected class, failing a basic requirement of the prima facie case under the indirect method. *Jordan v. City of Gary*, 396 F.3d 825, 833 (7th Cir. 2005) (plaintiff asserting sex and age discrimination claims failed to demonstrate that she was treated less favorably than someone outside of her protected class because the promotion she sought was filled by another woman over age 40). Additionally, Akers has introduced no evidence that Bailey, Yance, or any other employee was comparable to him in experience, education, achievement on the job, length of service with Home Depot, or any other characteristic that might have been relevant. Even if Akers' claims about the pay of other delivery coordinators were admissible, which they are not,

these claims alone are insufficient to demonstrate that other delivery coordinators were situated similarly to Akers. See *Dandy*, 388 F.3d at 274 (affirming summary judgment in favor of defendant where plaintiff failed to present evidence of comparator employees' qualifications, experience, education, salary during the relevant time period, or length of employment with the company); *Adams*, 324 F.3d at 939-40 (affirming summary judgment in favor of defendant where plaintiff's conclusory assertions about incidents outside her personal knowledge were insufficient to show that any similarly situated individual outside of her protected class was treated more favorably).

Accordingly, because Akers has failed to come forward with evidence either that he was subject to a materially adverse action or that he was treated less favorably than any similarly situated individual outside his protected class, no reasonable jury could find that he has demonstrated his prima facie case. His disparate pay claim cannot survive. *Traylor v. Brown*, 295 F.3d 783, 790 (7th Cir. 2002) (affirming summary judgment in favor of defendant where plaintiff failed to demonstrate a materially adverse employment action because plaintiff's "failure to establish one element of her *prima facie case*, even if she has established all of the others, is enough to support a grant of summary judgment in favor of her employer"); *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692-94 (7th Cir. 2005) (affirming summary judgment where plaintiff failed to demonstrate fourth element of prima facie case). Because Akers' claim fails on the prima facie case, the court does not reach the parties' arguments regarding pretext. *Peele v.*

Country Mutual Insurance Co., 288 F.3d 319, 326 (7th Cir. 2002) ("A plaintiff does not reach the pretext stage, however, unless she first establishes a prima facie case of discrimination."); *Jones v. Union Pacific Railway Co.*, 302 F.3d 735, 741 (7th Cir. 2002) (establishing the prima facie case of discrimination is a "condition precedent" to pretext analysis).

II. *Retaliation*

Akers also claims that Home Depot terminated him in retaliation for reporting race discrimination in violation of both Title VII and § 1981. Home Depot denies that it retaliated against Akers, and claims that it terminated him because he committed multiple safety violations while operating a fork lift at the store. A plaintiff may prove his claim of retaliation using either the direct or indirect methods of proof. Akers relies on the indirect method.

To demonstrate a prima facie case of retaliation under the indirect method, the plaintiff must demonstrate that (1) he engaged in a protected activity; (2) he was performing his job in accordance with his employer's reasonable expectations; (3) he suffered a materially adverse employment action; and (4) he was treated less favorably than similarly situated employees who did not engage in the protected activity. *Beamon*, 411 F.3d at 861-62; see also *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640, 644 (7th Cir. 2002). If the plaintiff establishes this prima facie case, the burden shifts to the defendant to advance a legitimate non-retaliatory reason for the adverse employment action. Once the defendant has

done so, the burden shifts back to the plaintiff to show that the defendant's given reason is a pretext for retaliation. *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 465 (7th Cir. 2002). If the plaintiff fails to raise a genuine issue of fact as to any element of the prima facie case, or as to whether the defendant's reason is pretextual, his retaliation claim cannot survive summary judgment. *Id.*

Home Depot argues that Akers' retaliation claim cannot survive summary judgment because he has failed to prove either his prima facie case or that Home Depot's reason for his termination, repeated safety violations, was pretextual.

Akers testified that his training at Home Depot included a review of the company's spotter and barricade standards, as well as the company's safety disciplinary policy. Akers Dep. at 63-64. He also testified that he received Home Depot's 2002 Orientation Guide ("the Guide") as part of his training. Akers Dep. at 70-72, Exs. 15 &16. The Guide includes the Rules of Conduct for Home Depot employees. Under the heading "Safety/lift equipment," the Guide states:

> These are examples of conduct that requires, at a minimum, written warning and retraining for a first violation and termination for a second violation, even if unrelated to the first violation.
>
> - failing to follow spotter and banner barricade standards. . . .
> - failing to wear a seat belt when operating sit-down lift equipment

Akers Dep. Ex. 15 at HD0842. Home Depot requires its fork lift drivers to have a "spotter" when operating a fork lift. Russell Aff. ¶ 7.

On August 9, 2002, Lintzenich cited Akers for failing to wear his seatbelt while operating a fork lift. Akers admits to that violation. Akers Dep. 107-08, Ex. 23; Akers Aff. ¶ 56. Lintzenich issued Akers a written notice stating: "Any second violation, [even] if unrelated to the first will result in termination." Akers read and signed the citation. Akers Dep. at 108, Ex. 23. Akers testified that he knew he was supposed to wear a safety belt when operating a fork lift. Akers Dep. at 107.

The parties dispute whether or not Akers followed Home Depot's safety rules on April 18, 2003. Lintzenich testified that on that day at about 10:30 a.m., he was walking into the contractor doors at the store with loss prevention specialist Jeff Isenhower when he observed Akers operating a fork lift without a spotter. Lintzenich testified that he asked Akers if he had a spotter and that Akers claimed co-worker Chris Turner was acting as his spotter. Akers asked Lintzenich to spot him while he drove the fork lift out of the store. Lintzenich Dep. at 95; Akers Dep. at 120-21, 123, Ex. 24. Lintzenich testified that he reminded Akers of the importance of using a spotter, spotted him as he went outside, and returned to the contractor desk. Lintzenich Dep. at 95.

Lintzenich testified that shortly after returning to Isenhower, he observed Akers drive the fork lift through the contractor doors. This time, according to Lintzenich, Akers was using Turner as his spotter but was not wearing his seat belt. Lintzenich asked Isenhower if he had also seen Akers operating the fork lift without a seat belt. The two viewed the store's security surveillance video to

determine whether it showed that Akers was not wearing his seat belt while operating the fork lift. After viewing the tapes, Lintzenich reported the violations to human resource manager Jeffrey Russell. *Id.* 95-97.

Akers' version of the events is just the opposite of Lintzenich's. Akers claims that Chris Turner was his spotter both times that Lintzenich observed him operating the fork lift, and also claims that he was wearing his seat belt both times as well. Akers Dep. 120-21, Ex. 24; Akers Aff. ¶ 56. Akers testified that, also on the morning of April 18, 2002, he was called to a meeting with assistant manager Leamon Walton, who was African American, and front end supervisor Mike Wagner. Akers Dep. at 109-11. He testified that Walton and Wagner told him that they were "writing [him] up" because of a problem with two orders. In his deposition testimony, Akers testified that he complained to Walters and Walton in the meeting that it was difficult to "get the merchandise out" because he and co-worker Carl Haslett could not find enough spotters, despite having asked both Walters and Walton for help finding spotters. Akers Dep. at 111-15. In his affidavit, Akers testified that he also complained during the meeting that management failed to provide spotters for him and Haslett, both African Americans, but that management provided spotters to Caucasian employees. Akers Aff. ¶ 40.[4]

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[4]Akers testified repeatedly that he was called to this initial meeting by Walters and Walton. See Akers Dep. at 109-15, 119. In his affidavit, Akers claimed that he was called into this meeting by Walton and Russell. See Akers Aff. ¶¶ 61, 38. "Where [a] deposition and [an] affidavit are in conflict, the affidavit (continued...)

After Lintzenich and Isenhower reviewed the surveillance tapes, Russell and Lintzenich met with Akers, explained that he was being suspended for committing safety violations, and escorted him out of the store. Akers denied the allegations. Akers Dep. 115, 118-21; Lintzenich Dep. at 96-99. Russell and Lintzenich then met with Turner, who denied that he had acted as Akers' spotter at 10:30 a.m. that day, contrary to Akers' claim. Lintzenich Dep. at 99; Akers Dep. Ex. 25.

After Lintzenich reviewed Akers' employee file and reported the situation to Russell, Meadows terminated Akers' employment at Home Depot on April 21, 2003. Lintzenich Dep. at 96; Akers Dep. at 125-27. Akers testified that he informed Meadows and Russell that he believed he was being terminated because he filed an EEOC charge, and that Meadows claimed that he was being terminated only because of the safety violations. Akers Dep. at 126-27.

A. *Akers' Prima Facie Case of Retaliation*

Home Depot argues that Akers cannot demonstrate that he was performing in accordance with reasonable expectations or that he was treated less favorably

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[4](...continued)
is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken . . . ." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 67-68 (7th Cir. 1995), quoted in *Adusumilli v. City of Chicago*, 164 F.3d 353, 360 (7th Cir. 1998). Akers' repeated claims in his deposition testimony that the meeting at which he complained of the dearth of spotters was with Walton and Walters, not Russell, make it highly unlikely that such testimony was mistaken. Akers offers no other explanation or argument for this discrepancy. Accordingly, the court disregards Akers' affidavit statement that Russell attended this initial meeting on April 18, 2002.

than a similarly situated individual who did not engage in a protected activity. The court agrees.

1. *Satisfactory Performance*

Home Depot argues that Akers was not performing in accordance with its reasonable expectations because he committed three safety violations, one in August 2002 and two just days before he was terminated in April 2003. Although Akers argues that the court should consider only whether Akers met Home Depot's reasonable expectations before the events that led to his termination, the Seventh Circuit requires the court to consider whether he was meeting Home Depot's expectations at the time he was terminated. *Luckie v. Ameritech Corp.*, 389 F.3d 708, 715 (7th Cir. 2004) ("the fact that [the plaintiff] may have met expectations in the past is irrelevant; she must show that she was meeting expectations at the time of her termination"); *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 545 (7th Cir. 2002) (same in race discrimination case). The parties do not dispute that the safety violations that Home Depot claims Akers committed on April 18, 2002 were terminable offenses under Home Depot's policy, and Akers does not challenge the policy as unreasonable. The only factual dispute between the parties is whether Akers committed the violations. The court finds that there is no triable issue of fact on this point, however.

Home Depot has presented testimony from Lintzenich that he observed Akers committing both violations. Home Depot has also admitted Turner's signed

statement to Home Depot that, contrary to Akers' assertion, he did not act as Akers' spotter when Lintzenich asked Akers if he had a spotter. Home Depot has filed the surveillance video viewed by Lintzenich on the day that he cited Akers for the safety violations. Akers does not dispute the authenticity of the surveillance video. The surveillance video, which includes five clips from varying angles, shows Akers operating his fork lift once without a spotter (in the first and fourth clips) and another time without wearing his seat belt (in the second, third, and fifth clips). See Lintzenich Supp. Aff. ¶ 5, Ex. 1.[5]

All that Akers offers in rebuttal is his sworn affidavit testimony that he did not commit the violations. A plaintiff's sworn denial might, under other circumstances, be sufficient to create a genuine issue of material fact as to whether he committed the safety violations at issue. Home Depot's evidence, however, including Turner's note that he did not act as a spotter for Akers during the first incident, Lintzenich's testimony, and the video surveillance, presents such compelling evidence that Akers was violating Home Depot's safety rules that no reasonable jury could find that he did not commit such violations.

[5]Akers' claims in his affidavit and his surreply brief that the video shows him wearing his seatbelt and operating the fork lift with a spotter are disingenuous at best. See Akers Surreply Br. at 5 ("the tape confirms that Chris Turner was spotting for Akers and it shows Akers was reaching and putting on his seatbelt"); Akers Aff. ¶ 58 ("The surveillance tape which Home Depot has provided to me shows Chris Turner spotting for me and it shows me putting on my seatbelt.") The surveillance footage from April 18, 2002 shows (1) Akers at 10:30 a.m. operating his fork lift with a seatbelt, but without a spotter, which is a violation of Home Depot's safety policy; and (2) Akers at 10:39 a.m. operating his fork lift with a spotter but without wearing a seatbelt, which is also a violation of the policy.

Accordingly, Akers has failed to raise a genuine issue of fact as to whether he was performing his job in accordance with Home Depot's reasonable expectations at the time he was terminated.

2. *Similarly Situated Individuals*

As a plaintiff opposing summary judgment, Akers must also offer evidence that he was treated less favorably than a similarly situated individual who did not engage in a protected activity. *Stone*, 281 F.3d at 644 (plaintiff carries burden of demonstrating the prima facie case); *Celotex*, 477 U.S. at 322-23 (explaining non-movant's burden on summary judgment). As with claims of discrimination, employees are similarly situated for the purposes of a retaliation claim only if they are "directly comparable in all material aspects." *Hudson v. Chicago Transit Authority*, 375 F.3d 552, 561 (7th Cir. 2004), quoting *Ajayi v. Aramark Business Services, Inc.*, 336 F.3d 520, 531-32 (7th Cir. 2003); *Rogers v. City of Chicago*, 320 F.3d 748, 755 (7th Cir. 2003). Akers does not satisfy his burden on this element of the prima facie case. Nor does he even attempt to do so.

Akers points to no identified persons outside the protected class to whom he is similarly situated. He offers only his own assertion that there was no employee who did not complain about discrimination who was terminated for "false" reasons. A party must present more than mere speculation or conjecture to defeat a summary judgment motion. The issue is whether a reasonable jury might rule in favor of the non-moving party based on the evidence in the record.

Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986); *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 637 (7th Cir. 2001). Akers' conclusory assertions of unequal treatment would not be enough to convince a jury that he was treated less favorably than a similarly situated employee who did not complain of discrimination. See *Rogers*, 320 F.3d at 755 (plaintiff's claim that no other officer in her district received similar treatment not sufficient to show that any other officer was similarly situated to her); *Oest v. Illinois Dep't of Corrections*, 240 F.3d 605, 614-15 (7th Cir. 2001) (affirming summary judgment in favor of employer on Title VII sex discrimination claim where plaintiff offered only her own conclusory statements that male co-workers were treated differently).

Because Akers has failed to meet his burden under the prima facie case, the court does not reach the parties' arguments regarding pretext. Akers' retaliation claim cannot survive Home Depot's motion for summary judgment. *Hilt-Dyson*, 282 F.3d at 465 (failure to satisfy one element of the prima facie case is fatal to plaintiff's claim); *Hudson*, 375 F.3d at 560-61 (affirming summary judgment where plaintiff could not show any similarly situated individuals treated differently); *Rogers*, 320 F.3d at 755 (same); *Beamon*, 411 F.3d at 863 (same); *Oest*, 240 F.3d at 614-15 (same in sex discrimination claim).

III. *Abandoned Claim*

Akers' argument in response to Home Depot's motion for summary judgment on his retaliation claim mixes assertions that Akers was terminated

because he reported discrimination with passing allegations that he was treated differently from Caucasian employees. For example, Akers claimed that Caucasian employees were not "hounded with questions about safety," were not disciplined for failing to wear seat belts or use spotters, and were never terminated for "false reasons." Docket No. 117 at 25. Home Depot urges the court to halt Akers' attempts to advance a disparate treatment claim based on his termination because he did not allege such discrimination in his complaint. See Def. Reply Br. at 14 n.11. Akers did not respond to this argument in his surreply.

Akers has never clearly asserted a claim that Home Depot terminated him because of his race. See Cplt. ¶¶ 33, 34, 60; see also Docket No. 19-1 at 2 (parties' case management plan, plaintiffs' synopsis of the case stating that after the employees complained of discrimination, "Home Depot did not correct the discrimination, but rather, criticized them for complaining, cut their hours further, refused to promote them, and terminated Mr. Akers"). Most important, Akers has failed to clearly address any such claim in his briefings on Home Depot's motion for summary judgment. At this stage in the litigation between the parties, over two years after the complaint has been filed and after extensive briefing on several issues, both the court and the defendant are entitled to a clear and coherent statement of the claims that Akers advances. Akers' failure to assert clearly any claim for racially discriminatory termination by this advanced stage precludes him from stealthily asserting it now or later.

Additionally, Akers' conclusory assertions alluding to a claim that he was disciplined or terminated because of his race fall far short of establishing either that (1) he was performing in accordance with Home Depot's expectations (for the same reasons discussed with respect to Akers' retaliation claim); (2) he was treated less favorably than a similarly situated employee; or (3) Home Depot's reason for his termination, repeated safety violations, was a pretext for discrimination. Accordingly, to the extent any such claim might have been advanced by Akers, he has failed to present evidence sufficient to raise a genuine issue of material fact as to whether he was terminated because of his race. Such a claim cannot survive summary judgment.

Conclusion

Akers has failed to demonstrate any issue of fact warranting trial on any of his disparate treatment or retaliation claims. Accordingly, Home Depot's motion for summary judgment on these claims (Docket No. 78) is granted.

So ordered.

Date: March 30, 2006

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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